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AS PRECEDENT OF THE TTAB JUNE 29, 00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Balton AB

Serial No. 75/266,854

Joel E. Bair of Rader, Fishman, Grauer & McGarry PLLC for
Balton AB

Suellen C. Hickey, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney)

Before Seeherman, Chapman and Bucher, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Balton AB has appealed from the refusal of the
Trademark Examining Attorney to register BALTON as a
trademark for the following goods:

Metal garment rails for installation in
closets; metal hat stands; metal wire
baskets; metal wire hooks; metal
construction components, namely, wire
panels and wire support rails (Class
6);

Metal shelving components, namely, wall rails, upright posts, and shelves; wire shelves; metal clothes hangers; metal furniture supports; furniture, namely, tables, desks, desktops, chairs, and shelves; coat hangers; coat stands; and racks for storage, display and filing of all types of goods (Class 20); and

Wire paper towel holders, wire bottle and glass holders, flower pot pedestals, non-metal wastebaskets (Class 21).¹

Registration has been finally refused pursuant to Section 2(e)(4) of the Trademark Act, 15 U.S.C. 1052(e)(4), on the ground that BALTON is primarily merely a surname.²

Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

It is the Examining Attorney's burden to demonstrate, prima facie, that BALTON is primarily merely a surname. See **In re Etablissements Darty et Fils**, 759 F.2d 15, 225 USPQ 652 (Fed. Cir. 1985).

In support of her refusal, the Examining Attorney has made of record excerpts from the Phonedisc database,

¹ Application Serial No. 75/266,854, filed March 31, 1997, based on first use as of May 1982 and first use in commerce as of May 1995.

² The Examining Attorney had also made final the requirement that applicant indicate whether BALTON has any significance in the relevant trade or industry. In its appeal brief applicant stated BALTON had no such significance. The Examining Attorney did not discuss this requirement in her brief, and therefore we consider it to have been satisfied.

showing that 90 listings were found for the surname "Balton." In addition, the Examining Attorney conducted a search of the Nexis database for this term, which retrieved 472 references. The Examining Attorney made of record excerpts from the first 20 articles. "Balton" appears as a surname in 13 of these articles; is part of a geographic name in four others (Balton Road, Providence; North Balton, apparently a ranger district in the Las Vegas or Albuquerque area; and Balton Spa, New York); and is a surname in two articles from South African publications and one from what appears to be a Scottish paper, since it is called the "Aberdeen Press and Journal" and spells "colour" in the British manner.

Moreover, with her appeal brief the Examining Attorney has submitted excerpts from several reference works³ showing that BALTON has no dictionary meaning and no geographical dictionary listing, and that BALTON is similar to other names, such as Walton and Barton, which are surnames, in order to support her position that BALTON has the look and feel of a surname.

³ The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

In view of the limited number of Phonedisc listings, some of which are in fact duplicates, "Balton" must be considered a relatively rare surname. However, even if people may not personally know someone with the name "Balton," the various Nexis excerpts show that many have been exposed to the use of "Balton" as a surname. In saying this, we have not considered the surname use in foreign publications. We have, however, considered the three articles which refer to the same individual, Rob Balton; the Nexis articles are not used to indicate the number of individuals named "Balton," but to show the public's awareness of "Balton" as a surname, and multiple articles referring to a single person with the surname "Balton" are evidence of such exposure. Moreover, although only 13 of the articles submitted by the Examining Attorney show surname use of "Balton" in the United States, the Nexis search, as stated above, retrieved 472 "hits." The Examining Attorney reported that in these hits the term was "overwhelmingly used as a surname." (Office action mailed February 1, 1999.) Given the fact that 13 of the first 20 articles show surname usage of "Balton" in United States publications, we have no reason to doubt that the remaining articles provide similar results.

In view of the evidence of public exposure to the use of "Balton" as a surname, coupled with the lack of evidence of another recognized meaning, and the evidence of surnames similar to Balton, we find that the Examining Attorney has met her burden of making a prima facie case that BALTON is primarily merely a surname.

In response to this evidence, applicant has argued that BALTON has a meaning other than that of a surname, namely, that of a geographical location in New York (Balton Spa), and that of a business (Balton and Sons). Applicant has also made of record listings of streets named "Balton" which were taken from the ProPhone for Windows database. These listings show that five people live on Balton Court in Naperville, Illinois, and that seven people live on Balton Drive in Akron, Ohio. In addition, there are Balton Avenues, Boulevards and Roads located in the Maryland suburbs of Washington, DC.

This minimal geographic usage, and the fact that a company bears the name Balton and Sons, does not persuade us that BALTON has sufficient non-surname significance that it would not be regarded as primarily merely a surname. As applicant itself has acknowledged, these usages may well have been historically named for individuals. That seems certainly to be the case for Balton and Sons; the article

refers to "D.F. Balton of Balton and Sons." "The Commercial Appeal," May 5, 1998. As for the street name uses, and the reference to Balton Spa, New York, the Court in **In re Harris-Intertype Corporation**, 518 F.2d 629, 186 USPQ 238 (CCPA 1975), rejected the argument that HARRIS was not primarily merely a surname based on more compelling evidence of geographic usages of HARRIS, including usage as the names of cities, counties, and streets, stating that such usages were either "somewhat obscure" or "the normal naming of a place or other item after an individual."

As in the Harris-Intertype case, we find that the minimal and relatively obscure evidence of geographic significance does not detract from the primary significance of BALTON, which is that of primarily merely a surname. Moreover, applicant has not provided any information as to how the mark was chosen, and has specifically stated that it has no significance in its trade or industry, such that the public might ascribe a non-surname significance to it. The mark is not stylized or used in such a manner as to convey as non-surname significance, as in the Benthin case, **In re Benthin Management GmbH**, 37 USPQ2d 1332 (TTAB 1995), and it has the "look and feel" of a surname. In this connection, in addition to the names referenced by the Examining Attorney from the dictionary, other people with

similar-sounding surnames are the well-known singer Michael Bolton, and the founder of Wal-Mart, Sam Walton.

Applicant has discussed the various factors which we may consider in determining whether a term is primarily merely a surname. We need not engage in an extensive discussion of them. Suffice it to say that our determination is not to be based on a mere mechanical adding up of which factors favor a finding that a term is primarily merely a surname, and which factors do not. Although no one with the surname "Balton" is associated with applicant, and the surname is a rare one, because of the other factors, as discussed above, we find that BALTON is primarily merely a surname.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

B. A. Chapman

D. E. Bucher
Administrative Trademark Judges
Trademark Trial and Appeal Board